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No. 95-388

In The

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether members of a multiemployer bargaining unit are subject to antitrust liability to their unionized employees for jointly utilizing, during the collective bargaining process, economic weapons authorized by the federal labor laws that affect terms and conditions of employment but do not adversely affect competition in any product market.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed at Pet. Br. ii-iii. The only corporate respondents with a parent company are Houston Oilers, Inc. (KSA Industries, Inc.) and Pro-Football, Inc. (Jack Kent Cooke, Incorporated). The only corporate respondents with a non-wholly owned subsidiary are Indianapolis Colts, Inc. (Colt Center Company) and Minnesota Vikings Football Club, Inc. (Minnesota Vikings Ventures, Inc.).

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 50 F.3d 1041. The opinions of the district court addressing the nonstatutory labor exemption (Pet. App. 64a-90a) and the scope of the antitrust laws (Pet. App. 93a-114a) are reported at 782 F. Supp. 125 and 1992-1 Trade Cas. (CCH) ¶ 69,747, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1995. A petition for rehearing and rehearing en banc was denied on June 12, 1995. Pet. App. 61a-63a. The petition for a writ of certiorari was filed on September 11,

1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the provisions reprinted in petitioners' brief (Pet. Br. 3-4), Section 6 of the Clayton Act, 15 U.S.C. § 17, Section 20 of the Clayton Act, 29 U.S.C. § 52, Sections 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 152(1) and (2), 158(d), 159(a), and Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, are reprinted at App., *infra* 1a-3a.

STATEMENT OF THE CASE

This is a labor dispute. Respondents, member clubs of the National Football League (NFL), are members of a multi-employer bargaining unit. Petitioners, player-employees of the NFL clubs, are members of the National Football League Players Association (NFLPA), the union certified as the exclusive bargaining representative of all NFL players. The subject of the dispute — salaries — is a mandatory subject of collective bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*. The challenged conduct was undertaken by the NFL as part of the collective bargaining process. The employees assert antitrust claims arising from a diminution of competition solely in the unionized labor market; the parties agree that the challenged conduct had no adverse impact on competition in any product market.

A. Statement of Facts

The NFL is a joint venture of interdependent member clubs that collectively produce a common entertainment product: NFL football, a series of athletic competitions that ultimately yield a Super Bowl champion. To produce their joint product, NFL clubs must collectively establish and maintain many common terms and conditions of employment for their player-employees. For example, NFL players must

agree to play the same number of regular season games and to abide by the League's established playing rules. Pet. App. 108a; J.A. 110-15.

The NFL's common rules are designed to enhance the quality of its entertainment product so that the League may compete effectively with other entertainment providers. Close and uncertain outcomes — for both individual games and for championships over the course of a season or seasons — are necessary to achieve this goal. J.A. 111-15. To promote such outcomes, NFL rules seek to ensure that no club secures an unfair or sustained advantage on the playing field. Rules adopted for this purpose include employment terms that disperse player talent among member clubs (such as the college draft) and "roster rules" that limit the number of players that a club may call upon in games or in practice. J.A. 114-15; Pet. App. 108a-09a.

The NFL's roster rules address the status of players who, because of injury, are unable to play in games. Such "Injured Reserve" players do not count toward their clubs' roster limits. During the 1980s, some clubs began to "stash" promising young players on Injured Reserve. In stashing, a club would report as "injured" healthy players for whom it did not have an immediate need, retain such players on its roster, develop their talent in practice and, without displacing any of its active-roster players, thereby secure a competitive playing field advantage.[1] Stashing prevented other clubs from

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[1] *See generally, e.g.*, Don Pierson, *Deep Redskins Pay The Price*, Chi. Trib., Jan. 21, 1992, at C1 ("[T]he Redskins are notorious for stretching the injured reserve system to its limits. Quarterback Mark Rypien spent two years on injured reserve before stepping up. Backup quarterback Stan Humphries spent his rookie season on the 'non-football illness' reserve list with a mysterious blood ailment. Young quarterback Cary Conklin also spent his 1990 rookie season on injured reserve.").

utilizing such promising players to improve their own active rosters. J.A. 100-01, 104-06.

To address this threat to the integrity and quality of the League's entertainment product, in March 1989 the League revised its roster rules to reduce clubs' incentives to stash players on Injured Reserve. J.A. 100-01, 104, 106-07. The same resolution (called "G-2") authorized each club to create a "Developmental Squad" — a unit of up to six rookie or first-year players who, as free agents, had been unable to earn a position with any club. J.A. 107-08. Developmental Squad members were to practice with their club's regular-roster players but could not play in games. *See generally* J.A. 100-09.

To preclude abuses of Developmental Squads similar to those that had plagued Injured Reserve, Resolution G-2 proposed that practice players be paid a uniform salary in an amount to be negotiated with the NFLPA. The uniform salary provision was intended to reduce the likelihood that quality players would agree to be stashed on Developmental Squads, where they would be inaccessible to other clubs needing their services in games and hence unavailable to improve the League's entertainment product. J.A. 102-03, 107.

In April 1989, the NFL initiated negotiations with the NFLPA over the terms and conditions of employment for Developmental Squad members. J.A. 101.[2] These negotiations continued for nearly four months. *See* J.A. 11-24, 101-02; Pet. App. 65a-67a. The NFLPA refused to agree to any uniform wage — at $1,000 per week, as the League had proposed, or at any other level. Faced with a clear impasse (Pet. App. 81a), the NFL implemented its proposal.

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[2] At all times relevant to the events at issue, the NFLPA was certified by the NLRB as the exclusive collective bargaining representative of all NFL players. J.A. 58-59.

Petitioners never challenged the district court's well-documented finding that "the parties did bargain at arm's length and in good faith to impasse." *Id.* Nor did their union exercise any collective bargaining weapons or mount any labor-law challenge to the League's action.

During the 1989 season, 236 Developmental Squad members were each paid $1,000 per week for their practice services, a restraint of the labor market that the district court characterized as neither "pernicious" nor "manifestly anticompetitive." Pet. App. 109a. Petitioners have explicitly acknowledged that this restraint had no adverse effect on competition in any product market. *Id.* at 29a & n.8.[3]

B. The Proceedings Below

"Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990." Pet. App. 95a. In June 1991, after a class had been certified, the district court (Lamberth, J.) granted plaintiffs' motion for partial summary judgment on the non-statutory labor exemption defense. The district court rejected the NFL's argument that the challenged conduct was protected by the exemption, which it held (1) had ended upon expiration of the previous collective bargaining agreement in 1987, or (2) had ended at impasse, or (3) did not apply because the challenged restraint had not been embodied in a collective bargaining agreement. Pet. App. 72a-90a. The district court later ruled that the challenged restraint on the labor market

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[3] Petitioners' assertion that the NFL discontinued the uniform salary term after it was challenged is misleading. Pet. Br. 12 n.7. For subsequent seasons, the parties bargained, and the district court approved, litigation settlements that prescribed team-wide maximums for practice player salaries, Pet. App. 100a n.6, and such terms were then addressed in the NFL's current collective bargaining agreement. The NFL's unilateral implementation of the uniform salary term — which was in place for only one season — was plainly among the factors leading to a bargained resolution of this issue for subsequent seasons.

was within the scope of the antitrust laws, Pet. App. 101a-04a, and ultimately enjoined the NFL from establishing "a uniform regular-season salary for any category of players whom [they] may at any time employ," J.A. 133-34.[4]

The court of appeals reversed. Pet. App. 1a-60a. Chief Judge Edwards' opinion for the court recognized that in implementing a bargaining proposal that had been negotiated in good faith to impasse, the NFL had used an authorized economic weapon available to employers in the collective bargaining process. The court observed that this Court's precedents have "made it clear that an employer's right to 'institute unilaterally the working conditions which he desires' is among the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." *Id.* at 23a (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)). The court therefore concluded that the NFL had been held liable under the antitrust laws for doing "exactly what federal labor policy condones." Pet. App. 5a.

For that reason, and because the uniform salary term had no adverse impact on the output market for the League's entertainment product, Pet. App. 29a & n.8, the court held that the NFL is "exempt from Sherman Act liability in this case." *Id.* at 32a. It determined (*id.* at 4a-5a) that

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[4] The district court held on summary judgment that implementaion of the uniform salary term violated Section 1 of the Sherman Act. The court recognized the NFL's evidence demonstrating that, by reducing stashing and enhancing the NFL's entertainment product, the uniform salary term yielded pro-competitive benefits; it nonetheless deemed that evidence "irrelevant" under the rule of reason, erroneously relying on a decision, *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), that had been effectively overruled by *NCAA v. Board of Regents*, 468 U.S. 85, 119-20 (1984). Pet. App. 110a-114a. The damages issue was then tried to a jury, resulting in a judgment of more than $30 million. J.A. 125-32.

> restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship.

The court explained that "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. . . . [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 24a-25a.

The court squarely rejected petitioners' suggestion that "routine practices of multi-employer bargaining," including the use of authorized economic weapons like the one at issue here, violate the antitrust laws:

> [T]here is no doubt whatsoever that [a] single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position . . . .

Pet App. 25a; *see also id.* at 25a-28a (discussing precedents and legislative history).

The D.C. Circuit's holding endorsed decisions of the Eighth Circuit and the Second Circuit that had reached the same conclusion. Pet. App. 21a-22a, 25a-28a (citing *Powell*

v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) (No. 95-137)).

Judge Wald dissented. Pet. App. 34a-60a. She joined the majority in recognizing that the nonstatutory labor exemption embraces "multiemployer 'bargaining tactics'" to which the union has not agreed, including actions by members of a multiemployer bargaining unit to lock out their employees. *Id.* at 53a n.7. She nonetheless proposed to exclude from the scope of the nonstatutory exemption only the tactic at issue here: the unilateral implementation of terms bargained in good faith to impasse. *Id.* at 59a. In any event, she would have reversed on the ground that the district court had erred in granting summary judgment under the rule of reason, *id.* at 36a n.3, an issue not reached by the majority, *id.* at 9a.

SUMMARY OF ARGUMENT

Congress has created a comprehensive system of collective bargaining as the *exclusive* means of determining terms and conditions of employment in unionized industries. That system, which affords employees and employers a balanced array of economic weapons, has as its cornerstone the complete exclusion of the government, including antitrust courts, from any substantive role in the bargaining process. Petitioners, who have received all of its benefits, now seek to undermine that system by invoking the radically different (and inconsistent) regime of the antitrust laws, which generally condemn collective behavior and require the courts to review the substantive reasonableness of the parties' conduct.

Petitioners' position, if accepted, would fundamentally alter and undermine multiemployer bargaining, a common practice that has been repeatedly encouraged and approved by Congress, this Court, the NLRB, and organized labor. Given the long history of such bargaining, it is noteworthy that no

court of appeals has ever accepted petitioners' position that the routine practices of multiemployer bargaining — practices fully authorized by the labor laws — are subject to antitrust review. The reasons are clear.

First, Congress has provided that terms and conditions of employment in unionized industries are to be determined exclusively by the collective bargaining process overseen by the NLRB, and not by antitrust courts. Indeed, as this Court has previously recognized, the antitrust laws simply do not apply to pure labor-market restraints — those that do not adversely affect competition in any product market. In any event, the principal function of the antitrust weapon that petitioners and their union seek to wield is not the establishment of a truly competitive market (the goal of the antitrust laws), but rather increased power in collective bargaining.

Second, even if otherwise within the scope of the Sherman Act, actions lawfully taken by employers in the course of the collective bargaining process that do not adversely affect competition in a product market are protected by the nonstatutory labor exemption. This exemption, as applied by the courts of appeals, is both necessary to preserve the labor law regime (which, as the government concedes, is of equal standing with the antitrust laws) and narrowly tailored to protect the collective bargaining process without affecting the core purposes of the antitrust laws.

The varying proposals of petitioners and their amici to limit the scope of the exemption lack any principled basis in the labor laws, the antitrust laws, or even common sense. Their suggestions are fundamentally inconsistent with crucial elements of the labor-law regime and would be so disruptive of the collective bargaining process as to make multiemployer bargaining unworkable.

Ultimately, the question here is whether, when employers' conduct limits competition *only* in a unionized labor market

and that conduct is fully authorized by the labor laws, the antitrust laws may properly be exploited as a weapon in collective bargaining. The courts of appeals have consistently rejected this proposition, and this Court should do so as well.

ARGUMENT

Petitioners and their amici contend that antitrust courts should be available to shape, if not to prescribe, terms and conditions of employment in unionized industries. No decision of this Court — and no decision of any court of appeals — supports such a notion.

That should not be a surprise. The labor laws rest on the fundamental premise that terms and conditions of employment in unionized industries are to be determined by the *process of collective bargaining, and that the government is excluded from that process*, except to the extent necessary to ensure compliance with the parties' obligation to negotiate in good faith. And there is ample authority, in both statutes and decisions of this Court, making clear that the antitrust laws do not apply to conduct that limits competition *only* in a labor market.

Something is fundamentally wrong with the contention that antitrust courts have a role to play in the collective bargaining process. As Judge Winter recently observed:

> [W]e find during the 104 succeeding years [since passage of the Sherman Act] not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (July 24, 1995) (No. 95-137). Even petitioners acknowledge that, aside from a few cases in the professional sports industry (where such efforts have been consistently rejected by the

courts of appeals), the antitrust laws have never been used as a collective bargaining weapon. Pet. Br. 39. And it is equally telling that petitioners, their amici, and the dissent below cannot agree on when during the collective bargaining process the antitrust weapon may be deployed or to what conduct it should be applied.[5]

Whether petitioners' contention is rejected on the basis that no conflict is presented between the antitrust and labor laws, as the Second Circuit held in *Williams*, or by an accommodation of the antitrust laws and the labor laws, as the D.C. Circuit held below, the required result is clear: Conduct undertaken as part of the collective bargaining process that limits competition only in a unionized labor market is not subject to antitrust review.

I. TERMS OF EMPLOYMENT IN UNIONIZED LABOR MARKETS ARE TO BE DETERMINED EXCLUSIVELY BY THE COLLECTIVE BARGAINING PROCESS.

A. The NLRA Establishes A Comprehensive Process, Intended To Be Free Of Governmental Interference, To Determine The Terms Of Employment In Unionized Labor Markets.

The National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1988), prescribes the framework for collective bargaining. *See Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 616 (1986); Robert A. Gorman, *Basic Text on Labor Law, Unionization, and Collective Bargaining* 5-6 (1976). The NLRA seeks to ensure that terms and conditions of

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[5] There appears to be disagreement even within the government. The government's brief reflects the views of the Department of Justice and the Federal Trade Commission, but it was not filed on behalf of the NLRB. *See* U.S. Br. 27 n.10 (simply indicating the NLRB's disagreement with the result below).

employment (including wages) are resolved at the bargaining table, not in the courtroom. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04, 108-09 (1970).

The NLRA expresses Congress' intent to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. That practice and procedure is a carefully developed and balanced bilateral process.[6] Employees have the right to combine for collective bargaining purposes. *See* 29 U.S.C. § 157. Employers have the same right; they may band together in a multiemployer unit, which functions "as a single entity in bargaining with a union or unions." *Williams*, 45 F.3d at 688.

Multiemployer bargaining is a widespread practice, involving millions of employees and thousands of employers, that antedates not only the NLRA, but also the Sherman Act. *Williams*, 45 F.3d at 688-89; *see also Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410 n.4 (1982). The NLRA makes no distinction between the rights and obligations of employers who participate individually in the collective bargaining process and those who participate as part of a multiemployer unit. *See* 29 U.S.C. § 152(1) & (2) (defining "employer" to include "any person acting as an agent of an employer" and defining "person" to include "associations").

This Court has recognized that multiemployer bargaining is "a vital factor in the effectuation of the national labor policy of promoting labor peace through collective bargaining." *NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo*

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[6] The NLRA "seeks to order labor markets through a system of countervailing power. Thus it is often referred to by economists as a bilateral monopoly." Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 22 (1971) (footnotes omitted).

Linen"), 353 U.S. 87, 95 (1957). Thus, for example, in *Buffalo Linen*, the Court unanimously upheld the legality of a joint lockout by members of a multiemployer unit. *Id.* at 97; *see also NLRB v. Brown*, 380 U.S. 278, 284, 292 (1965) (upholding lockout and hiring of replacement workers by multiemployer bargaining unit); *Bonanno Linen*, 454 U.S. at 419 (preserving stability of multiemployer units is a "proper and pre-eminent goal" of labor law).

In *Bonanno Linen*, the Court explained that multiemployer bargaining benefits employees as well as employers. 454 U.S. at 409-10 & n.3. It makes available to employees pensions, health insurance, and other benefits that could not be obtained from a single employer whose employees are too few or too transient to support such programs. For employers, it offers protection against whipsaw tactics and eliminates "'the competitive disadvantages resulting from non-uniform contractual terms'" for labor. *Id.* (quoting *Buffalo Linen*, 353 U.S. at 96).[7]

The labor laws regulate the collective bargaining process before, during, and after the parties reach substantive agreement. *See generally* Gorman, *supra*, at 399-539. A "mutual obligation" is imposed on both sides "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," the "mandatory subjects of bargaining." 29 U.S.C. § 158(d). Each side has access to a "'soup-to-nuts array' of rules, tribunals and remedies" in the event that the other fails to bargain in good faith or otherwise to comply with its procedural obligations. *Caldwell v. American Basketball Ass'n,*

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[7] The Court's explicit reference, in both *Buffalo Linen* and *Bonanno Linen*, to the elimination of competitive differences confirms the basic labor law principle that terms and conditions of employment in unionized industries are to be determined by the process of collective bargaining, not by operation of a competitive labor market.

Inc., 66 F.3d 523, 529 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (Dec. 20, 1995) (No. 95-1012).

The bargaining process affords each side "economic pressure devices . . . to make the other party incline to agree" to its proposed terms. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). For example, the union has the right to strike; the employers have the right to lock out. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309-11 (1965). The employers' authorized economic weapons include the conduct challenged by petitioners here: the right unilaterally to implement changes in terms and conditions of employment negotiated in good faith to impasse with the union. *Id.* at 316; see pp. 37-43, below. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel" of the collective bargaining process established by Congress through the labor laws. *Insurance Agents*, 361 U.S. at 489.

This carefully balanced process reflects Congress' "belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Except to ensure that the parties comply with their duty to bargain in good faith, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by *any* governmental power to regulate the substantive solution of their differences." *Insurance Agents*, 361 U.S. at 488 (emphasis added). The government's role is only to "oversee and referee *the process* of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co.*, 397 U.S. at 108 (emphasis added).

The strong policy against judicial intervention in the collective bargaining process, including multiemployer bargaining, is reflected not only in a consistent line of this

Court's decisions addressing the NLRA, but also in an array of other statutory provisions. *E.g.*, 29 U.S.C. § 104 (Norris-LaGuardia Act bar on injunctions in certain cases "involving or growing out of any labor dispute"); 29 U.S.C. § 52 (Clayton Act bar on injunctions in "any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment"). Thus, for example, "[w]hile the Norris-LaGuardia Act's bar [against] federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981).

As we demonstrate more fully at pages 29-31 below, if petitioners succeed in their effort to secure a role for antitrust courts in shaping the terms and conditions of employment in unionized industries, they will have undermined and fundamentally altered the collective bargaining process by shifting resolution of labor disputes from the bargaining table to the courts. Such a result would be at odds with established labor-law jurisprudence and with congressional intent, which sought "to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 716 (1965) (Goldberg, J.).

B. The Labor Laws, Not The Antitrust Laws, Are The Source Of The Competition Interest Asserted By Petitioners.

Notwithstanding their membership in a union certified as their exclusive bargaining representative, their participation in a broad spectrum of collectively bargained benefits, and their access to an array of economic weapons afforded their union

under the labor laws, petitioners nonetheless assume that each of them had a right *under the antitrust laws* to negotiate individually his salary as a practice player.

That proposition cannot be reconciled with basic labor-law tenets. It is well established that when employees combine for collective bargaining purposes, they "extinguish[] the individual employee's power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also* 29 U.S.C. § 159(a) (the union "shall be the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to the rates of pay"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (collective bargaining's purpose is to "supersede the terms of separate agreements of employees"); *Caldwell*, 66 F.3d at 528 (in a collective bargaining relationship, "the employee loses the right to bargain for the best price for his or her labor").[8]

That is not to say that the union cannot secure for its members, *through the collective bargaining process*, the right to negotiate individually over certain terms of employment. *J.I. Case*, 321 U.S. at 338. But to the extent that it exists in a unionized industry, "individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell*, 66 F.3d at 528.

In a unionized industry, individual bargaining of terms and conditions of employment may not occur unless both the union and the employers consent. Without union consent, the

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[8] More generally, a competitive market of the kind ordinarily sought by the antitrust laws is displaced by "the association of employees to eliminate competition over wages and working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

employers commit an unfair labor practice if they attempt to bargain with an individual employee. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944). Similarly, the union cannot avoid its own duty to bargain *collectively* over mandatory subjects, including wages, 29 U.S.C. §§ 158(d), 159(a), unless it secures the employers' consent through collective bargaining.

Here, through the collective bargaining process, the parties' representatives *created* the "right" asserted by petitioners to negotiate individually certain salary terms. J.A. 59 (expired CBA "authorized individual salary negotiations"); Pet. App. 88a (same); *id.* at 36a n.2 (players "sought to achieve employer competition through the . . . collective bargaining process") (Wald, J., dissenting). *See generally Allis-Chalmers Mfg. Co.*, 388 U.S. at 180 ("Congress has seen fit to clothe the bargaining representatives with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." (quotation omitted)). Put differently, the competition interest asserted by petitioners finds its source not in the antitrust laws but rather in the labor laws; its source is (1) the consent of the union, itself a creature of the NLRA, and (2) the consent of management, secured by the union through the collective bargaining process established by the NLRA.

In other industries, in which neither unions nor multiemployer units have consented to individual negotiations for unionized employees, an *antitrust* challenge to a unilaterally implemented wage scale would have been almost unthinkable prior to the district court's decision below. *See Caldwell*, 66 F.3d at 530 ("There is no precedent outside sports for ever initiating this genre of litigation."); *accord* Pet. Br. 39. The reason is clear. In those industries, no "competition" interest of the kind asserted by petitioners exists because *none has been created through the process established by the labor laws*. And no *antitrust* right exists for such

employees because the decision to unionize "extinguishes the individual employee's power to order his own relations with his employer." *Allis-Chalmers Mfg. Co*, 388 U.S. at 180.

The labor laws not only provide the source for the competition interest that petitioners assert here; they also provide means to *protect* such an interest. Statutory remedies, including cease and desist orders, are available if employers breach a contractual commitment to allow individual negotiations or if employers attempt to withdraw such opportunities prematurely or in bad faith during the collective bargaining process. As demonstrated in the professional sports industry, collectively bargained remedies may also be available.[9]

Thus, it should not be surprising that every court of appeals to address this issue has held that employees must look to the labor laws — not to the antitrust laws — to protect any competition interest of the kind asserted by petitioners here.

II. THE SHERMAN ACT DOES NOT REACH LIMITATIONS ON COMPETITION IN A LABOR MARKET THAT DO NOT ADVERSELY AFFECT COMPETITION IN A PRODUCT MARKET.

Petitioners and their amici assert that joint action by employers that restrains *only* a labor market is subject to the antitrust laws unless it falls within an implied exemption. *See* Pet. Br. 24-25; U.S. Br. 10. They are wrong, and not only for the reasons set forth above. Their argument also ignores

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[9] For example, the NFL now operates under collectively bargained anti-collusion provisions that prohibit agreements among the NFL clubs that restrict or limit individual club decision-making in numerous areas, including wages, authorize enforcement of that proscription in evidentiary proceedings before a Special Master, and provide for extensive remedies, including treble damages.

both (1) this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), which held that the Sherman Act prohibits only restraints affecting "commercial competition in the marketing of goods or services," *id.* at 495, and (2) the plain language of Section 6 of the Clayton Act, which declares that "[t]he labor of a human being is not an article of commerce," 15 U.S.C. § 17. *See generally Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 636 (1975) (the Court has reconciled the antitrust and labor laws "not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves").

A. The Sherman Act Applies Only To Restraints On Competition In A Market For Goods Or Services.

This Court has long interpreted the broad language of Section 1 of the Sherman Act in the light of "the particular evils at which the legislation was aimed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *see Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (Sherman Act prohibits only agreements that are "unreasonably restrictive of competitive conditions"). In *Apex Hosiery*, the Court held that agreements limiting competition only in a labor market are not within the scope of the Sherman Act. "[S]ome form of restraint of commercial competition," the Court declared, is "the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act." 310 U.S. at 500.

Apex Hosiery was an antitrust challenge to a sit-down strike. In holding that the challenged conduct was outside the scope of the Sherman Act, the Court concluded, based on its review of the history and purpose of the Act, that

> [t]he end sought [by Congress] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise

> prices or otherwise control the market to the detriment of purchasers or consumers of goods and services.

Id. at 493. After observing that the term "restraint of trade" "had a well-understood meaning at common law," *id.* at 494-95, and that the Sherman Act was aimed at restraints "comparable to restraints deemed illegal at common law," *id.* at 498, the Court concluded that a restraint on a labor market "was not considered an illegal restraint of trade at common law when the Sherman Act was adopted," *id.* at 502.[10] Accordingly, it held that absent "an effect upon prices in the market or [an effect that] otherwise . . . deprive[s] purchasers or consumers of the advantages which they derive from free competition," *id.* at 501, labor market restraints "are not within the Sherman Act." *Id.* at 512.

Although the defendants in *Apex Hosiery* were a labor union and its officers, the Court confirmed that the Sherman Act should be applied impartially to "the activities of industry and labor alike." *Id.* at 512. The Court made clear that it was not defendants' status as employees that placed their activities outside the reach of the Sherman Act. *Id.* at 488-89. The determinative fact was that the challenged restraint did not affect competition in the marketing of goods or services, and thus "*the effect* of the combination or conspiracy" was not a "restraint of trade within the meaning of the Sherman Act."

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[10] Agreements among employers over wages — like agreements among employees — were enforceable at common law. *See The Master Stevedores' Ass'n v. Walsh*, 2 Daly 1, 13 (N.Y. Ct. of Common Pleas 1867) ("it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices"); Louis B. Boudin, *The Sherman Act and Labor Disputes: II*, 40 Colum. L. Rev. 15, 42-47 (1940) (common law did not prohibit agreements among employers or employees over wages that did not affect competition in the employers' output market).

Id. at 501 (emphasis added). Indeed, the Court found it "significant" that it had

> never applied the Sherman Act in any case, *whether or not involving labor organizations or activities*, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services.

Id. at 495 (emphasis added). For more than fifty years, this Court has never varied from that principle. It should not do so here.

B. Section 6 Of The Clayton Act Precludes Application Of The Sherman Act To Conduct That Limits Competition Only In A Labor Market.

Although the Court's decision in *Apex Hosiery* rested primarily on its interpretation of the Sherman Act, the Court also relied on Section 6 of the Clayton Act, *see* 310 U.S. at 502-03, which provides that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. The plain meaning of this provision is that the antitrust laws do not apply to restraints that limit competition only in a market for labor.

This plain meaning is confirmed by the legal background against which Congress enacted the Clayton Act in 1914. In that era, various activities were understood not to be "commerce," and were therefore outside the scope of the antitrust laws. *See, e.g., New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 503-04, 510 (1913) ("contracts of insurance are not commerce at all, neither state nor interstate"). The language of Section 6 thus was precisely suited

to carving out from the antitrust laws restraints that adversely affect only the labor market.[11]

The government asserts that the legislative history of Section 6 "gives no indication that Congress intended to immunize *employers'* unilateral (*i.e.*, not negotiated with a union) combinations in restraint of labor markets." U.S. Br. 12 n.4. The government's analysis is backwards: the Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994). In any event, the legislative history of Section 6 confirms that "labor is not, and ought not to be regarded as, a commodity, within the purview of the antitrust laws." S. Rep. No. 698, 63rd Cong., 2d Sess. 46 (1914).[12] Giving effect to the plain language of Section 6 is fully consistent with the purpose of the statute, which "'was designed to *equalize* before the law the position of workingmen and employer as industrial combatants.'" *United States v. Hutcheson*, 312 U.S. 219, 229 (1941) (quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting)) (emphasis added).

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[11] The Court subsequently held that insurance is within the scope of the commerce power, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); Congress responded by enacting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq*. The constitutional issue did not arise with respect to labor because *Congress* provided that labor is not an article of commerce. 15 U.S.C. § 17.

[12] *See also, e.g.*, 51 Cong. Rec. 14,019 (1914) (statement of Senator Jones) ("[Labor] is no part of commerce. It is not a commodity at all."); *id.* 13,980 (statement of Senator Cummins) ("Labor is not a commodity; it is not an article of commerce . . . .").

C. This Court Has Consistently Adhered To The Distinction Between Restraints Of Labor Markets And Restraints Of Product Markets.

In the half century since *Apex Hosiery*, this Court has never wavered from the distinction between labor-market effects and product-market effects of challenged restraints. In *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 806, 809 (1945), the Court, relying on *Apex Hosiery*, reaffirmed that the Sherman Act was intended "to protect consumers" and "to preserve business competition." And in *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945), decided the same day as *Allen Bradley*, the Court held that the Sherman Act is not implicated by a suit between a union and an employer that "involves nothing more than a dispute over employment."

Thirty years later, in *Connell Construction*, the Court concluded that certain union activity violated the Sherman Act because it had impermissible effects on a "business market . . . that would not follow naturally from the elimination of competition over wages and working conditions." 421 U.S. at 625. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 530, 540 (1983), the Court again affirmed that the Sherman Act was intended to protect consumers in product markets, and held that the union did not suffer antitrust injury because its "labor-market interests seem to predominate."[13]

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[13] The *Apex* distinction has been followed by lower courts and approved by leading commentators. *See, e.g., Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 135 (8th Cir. 1979); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 372-73 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1306 (E.D. Wash. 1981); Archibald Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254-56 (1955);

Petitioners and the government cite *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), and *Radovich v. NFL*, 352 U.S. 445 (1957), in support of their assertion that the antitrust laws apply to restraints on a labor market without regard to any product market effect. Pet. Br. 24-25; U.S. Br. 10. Neither case stands for that proposition. *Anderson* was decided prior to *Apex Hosiery*, and therefore was encompassed by the Court's subsequent statement that it "has never applied the Sherman Act in any case . . . unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery*, 310 U.S. at 495.[14]

Moreover, the Court in *Anderson* deemed irrelevant the defendants' assertion that "the *object* of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object . . . might have been unobjectionable in the absence of such restraint." 272 U.S. at 363 (emphasis added). If the Court had intended to hold that

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Milton Handler, *Reforming The Antitrust Laws*, 82 Colum. L. Rev. 1287, 1341, 1347-48 (1982); Michael S. Jacobs & Ralph K. Winter, Jr., *supra*, 81 Yale L.J. at 26; Douglas L. Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1195-99 (1980); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 34-58 (1986); Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 606 (1976). We recognize, of course, that some lower courts and commentators read *Apex Hosiery* and Section 6 more restrictively. *See, e.g.*, Pet. App. 37a-38a (Wald, J., dissenting) (citing cases and commentators).

[14] Justice Stone, who authored the Court's opinion in *Apex Hosiery*, was a member of the Court when *Anderson* was decided, although he did not take part in the decision of that case. The dissenters in *Apex Hosiery* (including Justice McReynolds, who participated in *Anderson*) did not disagree with Justice Stone's statement.

regulation of employment, without more, was within the scope of the Sherman Act, it undoubtedly would have said so. *See also* Brief for Pet., *Anderson* (No. 306), at 79 (arguing that the challenged restraint, which prevented individual shipowners from hiring the seamen they deemed most suitable, was "destructive of competition not only as to the employee but also as to the employer," in part because it "would eventually lessen the standard of efficiency").

In *Radovich*, the plaintiff alleged that the labor practice at issue was part of an alleged "conspiracy to boycott the All-America Conference and its players with a view to its destruction." 352 U.S. at 449. Thus, there can be no doubt that the restraint at issue in *Radovich* also was alleged to have adverse effects on the product market.

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Professor Cox wrote years ago: "No one seriously suggests that antitrust policy should be concerned with the labor market per se." Archibald Cox, *supra*, 104 U. Pa. L. Rev. at 254. More recently, Professor Handler, citing *Apex Hosiery*, observed that "Congress did not intend that the anti-trust laws reach conduct by a union, or anyone else, unless such conduct had a direct, substantial effect on 'commercial' competition in the provision of goods and services." Milton Handler, *supra*, 82 Colum. L. Rev. at 1341.

No less an interested party than the AFL-CIO has agreed, acknowledging in a brief submitted to this Court:

> The product market, not the labor market, is the proper domain of the antitrust laws, and activity in the labor market to set wages, hours and working conditions . . . is not within their purview.

Amicus Curiae Brief for AFL-CIO, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (No. 48), at 8. Thus, as the AFL-CIO recognized, "agreements among employers acting

alone, without the intervention of a union, to fix labor standards would . . . have no antitrust implications." *Id.* at 8 n.5. This Court should again so confirm.

III. ANY NECESSARY ACCOMMODATION OF THE ANTITRUST AND LABOR LAWS WOULD REQUIRE AFFIRMANCE OF THE JUDGMENT.

The antitrust laws are premised on a model of free competition. The labor laws, in contrast, are premised on a model of countervailing power and organized negotiation, with combinations and "collusive activity" not only authorized, but encouraged and often required, for both employees *and* employers. *See* pp. 11-15, above. *Both* are "expression[s] of fundamental national policy," as the government has acknowledged. U.S. Br. 10; Pet. App. 122a.

To the extent that the two schemes conflict, this Court has recognized an exemption from the antitrust laws to accommodate "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr.*, 421 U.S. at 622; *see also Jewel Tea*, 381 U.S. at 689 (White, J.) (exemption "accommodat[es] the coverage of the Sherman Act to the policy of the labor laws").

Such an accommodation would be necessary here only if this Court were to conclude (a) that the competition interest asserted by petitioners arises from the antitrust laws and (b) that restraints limiting competition solely in labor markets are within the scope of the antitrust laws.[15] If it so concludes,

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[15] None of this Court's prior decisions addressing the nonstatutory labor exemption presented the issue addressed by Part II, above; each involved an alleged *product* market restraint. *See, e.g., Connell Constr.*, 421 U.S. at 635 (addressing the restraint's "potential for restraining competition *in the business market* in ways that would not follow naturally from elimination of competition over wages and working conditions"

the Court must determine whether the appropriate accommodation of these two "fundamental national polic[ies]" is one that insulates from antitrust challenge only collective bargaining agreements, as petitioners contend, or one that embraces the "practice and procedure of collective bargaining," 29 U.S.C. § 151, as the courts of appeals have consistently held.

A. The Exemption Prescribed By The Courts of Appeals — Limited To Actions Lawfully Taken As Part Of The Collective Bargaining Process — Is The Only Proper Accommodation Of The Congressional Policies Favoring Collective Bargaining And Free Competition In Business Markets.

Recognizing that federal labor policy focuses on collective bargaining as a process, both the court of appeals below and the Second Circuit have recently held that the nonstatutory labor exemption must embrace "all lawful actions taken by either unions or employers pursuant to the collective bargaining process." Pet App. 20a; *accord Williams*, 45 F.3d at 693. These holdings reflect the fact that, as the government has acknowledged, the labor laws' embodiment of a *process* for

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(emphasis added)); *Jewel Tea*, 381 U.S. at 681, 682 (White, J.) ("the complaint [alleged a conspiracy] to prevent the retail sale of fresh meat before 9 a.m. and after 6 p.m." and "adversely affected the general public"); *Allen Bradley Co.*, 325 U.S. at 798 (the manufacturers "brought this action because of their desire to sell their products in New York City, a market area that had been closed to them"). *See generally Richards v. Neilsen-Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, J.) ("We understand *Connell* to hold that the nonstatutory exemption is unavailable to shield agreements reached outside the context of collective bargaining where the challenged action imposes direct restraints on a business market . . . .").

achieving labor goals is "an expression of fundamental national policy." U.S. Br. 10.

This narrowly tailored accommodation reflects precisely the approach to harmonizing the antitrust and labor laws called for by this Court's prior cases. In *Connell Construction*, the Court framed the issue in terms of the need to accommodate "the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business* markets." 421 U.S. at 622 (emphasis added). Similarly, in *Jewel Tea*, the Court spoke in terms of "accommodating the coverage of the Sherman Act to the *policy of the labor laws*." 381 U.S. at 689 (White, J.) (emphasis added).[16] Nonetheless, petitioners and the government assert that these holdings — and the similar holdings of other courts of appeals — offend a general canon of statutory construction that exemptions from the antitrust laws are disfavored and should be narrowly construed. They are wrong.

This Court has never invoked such a canon in its prior cases addressing the nonstatutory labor exemption. In fact, this Court has described the nonstatutory labor exemption as a "broad labor exemption from the antitrust laws." *Associated Gen. Contractors*, 459 U.S. at 539. The reason is clear. As the government expressly recognizes, and as this Court's precedents confirm, the labor laws are no less "an expression

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[16] The courts of appeals have also recognized that the purpose of the exemption is to protect "the collective bargaining *process* commanded by the labor laws." *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 n.14 (7th Cir.) (emphasis in original), *cert. denied*, 459 U.S. 860 (1982); *accord Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) ("To preserve the integrity of the negotiating *process*" (emphasis added)). *See also* Michael S. Jacobs & Ralph K. Winter, Jr., *supra*, 81 Yale L.J. at 22 (it is the "*structure* [that] is to be protected by law" (emphasis added)).

of fundamental national policy" than the antitrust laws. U.S. Br. 10. The government is therefore correct in acknowledging that if "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, . . . the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." U.S. Br. 16-17 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)); *accord* Pet. Br. 17.[17]

This is not a situation, as petitioners seem to imply, in which the statute to be harmonized with the antitrust laws prescribes some "particular substantive" result. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985). The NLRA instead prescribes a *process*, the "fundamental premise" of which is that *government will be excluded* except to ensure compliance with "the procedure alone." *H.K. Porter*, 397 U.S. at 108; *Insurance Agents*, 361 U.S. at 488; *see also American Ship Bldg.*, 380 U.S. at 317 (the "central purpose" of the NLRA was to create and to protect "the process of collective bargaining"); U.S. Br. 22 ("the NLRA focuses on the bargaining process"). Further, that process contemplates *collective* action by employees and by employers — a notion generally antithetical to the antitrust laws. Exposing lawful elements of the collective bargaining process to review by an antitrust court would inject the government into the collective bargaining process in a manner inconsistent with the "fundamental premise" of this statutory scheme.

The history of labor relations and associated antitrust litigation in professional sports — a regular cycle of union-sponsored antitrust litigation (including this suit), followed by

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[17] The plain language of Section 6 of the Clayton Act and the other statutory evidence upon which this Court relied in *Apex Hosiery*, *see* 301 U.S. at 503-04 & n.24, *at a minimum* reinforce this conclusion. *See* pp. 19-26, above. Because labor markets were not central to the concerns underlying the Sherman Act, the antitrust laws should yield to the NLRA.

a collective bargaining agreement, followed by more union-sponsored antitrust litigation — so confirms. The purpose of such litigation has never been to effectuate the antitrust objective of creating a truly competitive labor market; such lawsuits instead serve the union's *bargaining* objectives by invoking the prospect — or the reality — of the *government's* shaping the terms and conditions of employment.

Prior to their most recent collective bargaining agreement, the NFLPA funded and pursued numerous antitrust suits against the NFL, challenging terms and conditions of employment ranging from practice player salaries (*Brown*) to veteran free agency rules (*McNeil*) to pre-season pay for veteran players (*Tice*) to health insurance benefits (*Jackson*). *See White v. NFL*, 822 F. Supp. 1389, 1421 (D. Minn. 1993) ("the NFLPA has supported numerous player lawsuits challenging the legality of various NFL player restraints, and it has entirely funded the present class action [and] its predecessors *Powell* and *McNeil*").[18] In each case, the NFLPA was plainly "seeking to gain through the courts what they could not win at the bargaining table." *Powell v. NFL*, 678 F. Supp. 777, 781 n.9 (D. Minn. 1988), *rev'd with instructions to enter judgment for defendants*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Moreover, there was never any doubt, as petitioners' amici have candidly acknowledged, that

> regardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or the players will permanently choose

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[18] Those NFLPA-funded cases include, in addition to this case (Pet. App. 95a): *White*, *supra*; *Powell*, *supra*; *Allen v. Chargers Football Co.*, No. CV-91-4322 CBM (C.D. Cal.); *Jackson v. NFL*, Civ. No. 4-92-876 (D. Minn.); *Joyner v. NFL*, Civ. No. 92-2876 (E.D. Pa.); *McNeil v. NFL*, Civ. No. 4-90-476 (D. Minn.); and *Tice v. Pro Football, Inc.*, Civ. No. 91-2314 (RCL) (D.D.C.).

> to forego their mutually dependent business opportunities. Thus, allowing employees to pursue their Sherman Act claims will likely alter the substance of the collective bargain . . . .

Brief for National Basketball Players Ass'n *et al.*, *Williams*, (2d Cir. No. 94-7709) ("NBPA Br."), at 27-28.

In fact, the terms and conditions of employment addressed by such suits were ultimately established not by operation of a competitive market, but rather through litigation settlements promptly incorporated, *in haec verba*, into a collective bargaining agreement. *White v. NFL*, 836 F. Supp. 1458, 1499-1500 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). *See also* p. 5 n.3, above. This was not the first time that the NFLPA — or its counterpart in the NBA — had used the antitrust courts in this way. *See Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶ 61,730, at 72,990 (D. Minn. 1987) ("NFLPA sponsored this action and the *Mackey* action"), *aff'd sub nom. Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978); *id.* at 72,997 (litigation settlement "incorporates the [new] Collective Bargaining Agreement by reference"); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 962 (D.N.J. 1987) ("the Players Association and the NBA . . . entered into a multi-year collective bargaining agreement that incorporated the substantive terms of the settlement agreement" in *Robertson v. NBA*). There is no doubt about the primary, if not the exclusive, purpose of such suits: using the antitrust courts to serve the union's *bargaining* objectives.

This case, and others like it involving antitrust challenges to collective bargaining conduct, are therefore very different from the implied immunity cases upon which petitioners and the government rely. As this Court has recognized, it is plain that Congress intended to oust the government from *any* role in the *process* of determining the terms and conditions of

employment of unionized employees. *See* pp. 11-15, above. Thus, here antitrust immunity "*must* be implied in order to permit the [NLRA] to function as envisioned by Congress," *i.e.*, without substantive government intervention. *Gordon v. New York Stock Exch.*, 422 U.S. 659, 688 (1975) (emphasis added). Otherwise, antitrust courts would be regulating terms and conditions of employment in unionized labor markets under the guise of the Sherman Act.[19]

In any event, the exemption as applied by the courts of appeals *is* narrowly tailored to the competing federal labor policy. As circumscribed by the D.C. and Second Circuits, the exemption applies only to conduct undertaken as part of the collective bargaining process, only to limitations on competition in the labor market, and then only to the extent of the relevant bargaining units. The antitrust laws continue to apply, for example, to unreasonable restraints on a product market. *Pennington*, *Jewel Tea*, and *Connell Construction* (as well as *Anderson* and *Radovich*) illustrate this point. Thus, the accommodation prescribed by the courts of appeals gives full effect to the core policies of the Sherman Act.

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[19] In light of Section 1's vagueness and generality (and even without regard to the substantive analysis of *Apex Hosiery*), any support for a different accommodation would plainly have to be derived from judicial development of the statute's substantive content, *see generally Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 354 (1982), and would depend less on express statutory language than on "a legal disposition implied by a statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1988). "This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. And that is what we have here." *Id.*

B. There Is No Requirement Of Union Consent For The Exemption To Apply.

The heart of petitioners' brief is an extended argument that "employee consent embodied in a written agreement is required" before the nonstatutory labor exemption applies. Pet. Br. 18 (emphasis deleted); *see id.* at 18-30. This argument has no support in this Court's precedents. As the court below recognized:

> each of the pertinent Supreme Court cases involved an antitrust challenge to a union-employer agreement. In such circumstances, the Court's reference to the nonstatutory labor exemption in terms of a potential shield from antitrust liability for such agreements is hardly surprising. Certainly, no Supreme Court case expressly limits the exemption in the manner suggested by the appellees.

Pet. App. 14a-15a (footnote omitted); *accord id.* at 44a (Wald, J., dissenting). A reading of those cases so confirms. *See also* U.S. Br. in Support of Cert. at 11 (issue is "one of first impression").[20]

The courts of appeals have consistently held that employee consent to the challenged restraint is *not* required for the exemption to apply. The Second Circuit, like the D.C. Circuit below, recently confirmed that "the antitrust laws

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[20] Petitioners' heavy reliance (at 20) on passages from *Jewel Tea* is particularly misleading. The opinions of Justice White and Justice Goldberg, each representing the views of three Justices, both *endorsed* immunity for the challenged restraint; the issue between them (which is irrelevant here, *see* J.A. 341) was whether the nonstatutory exemption should be *limited* to restraints that principally affect the labor market. 381 U.S. at 691 (White, J.); *id.* at 721-22 (Goldberg, J.). Neither opinion supports petitioners' position that union consent is *necessary* for the exemption to apply, an issue that the Court did not even address.

do not prohibit employers . . . from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals." *Williams*, 45 F.3d at 693. The Eighth Circuit is in accord. *Powell v. NFL*, 930 F.2d 1293, 1298, 1303 & n.10 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Other courts of appeals have agreed.[21] No appellate court has reached a contrary holding.[22]

A union consent requirement is utterly incompatible with multiemployer bargaining. Indeed, petitioners themselves ultimately acknowledge that union consent cannot be the test. Pet. Br. 40 (recognizing that lockouts, hiring of replacement workers, and strike insurance are protected). Petitioners' acknowledgment is confirmed by the government:

> Some joint action by employers in a multi-employer bargaining unit must, of course, fall within an implied exemption if the collective bargaining regime is to operate. Thus, resumption of good-faith bargaining between the union and the employers in the multi-employer bargaining unit to reach a new agreement would be within the implied exemption, just as the bargaining to negotiate the expired contract was exempt.

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[21] *E.g.*, *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1007 (5th Cir. 1970) (refusal to deal with a union), *cert. dismissed*, 404 U.S. 801 (1971); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159, 1163 (6th Cir. 1968) (lockout), *cert. denied*, 395 U.S. 923 (1969); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 373 (2d Cir.) (strike insurance plan), *cert. denied*, 375 U.S. 830 (1963).

[22] The issue presented in the cases upon which petitioners rely (at 22 n.13) was not whether union consent was *necessary* for the exemption to apply, but rather whether union consent was *sufficient* to require application of the exemption. *See, e.g.*, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

U.S. Br. 18 n.5. Similarly, Judge Wald, dissenting below, recognized that "if the collective bargaining process is to work without undue interference from antitrust law, multi-employer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7.[23]

The absence of a "consent" requirement is easily demonstrated. For example, it has long been recognized that multiemployer lockouts, which are undertaken without employee consent, are protected from antitrust liability.[24] Petitioners acknowledged below and in this Court that members of a multi-employer bargaining unit could not "be held liable for locking out employees to gain an advantage in negotiations." Pet. App. 22a-23a; Pet. Br. 40; *accord* Pet. App. 53a n.7 (Wald, J., dissenting); *Williams*, 45 F.3d at 691-92; *see also* AFL-CIO Amicus Curiae Br., *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (No. 81-334) ("AFL-CIO Br."), at 16-17 (The exemption applies to "businesses as well as unions. . . . [T]he lockout is no more subject to anti-trust regulation than the strike."). *But see* U.S. Br. 18 n.5. And that is true even though a lockout — a concerted refusal to deal — restrains

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[23] The premise for petitioners' "consent" notion is their assumption (at 18-19) that the nonstatutory exemption "derives from . . . the so-called 'statutory labor exemption'" reflected in Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, which in their view protect only unions. Pet. Br. 18-19, 21. Petitioners' assumption is incorrect, as the government points out: "the implied labor exemption to the Sherman Act recognized in *Jewel Tea* is in fact firmly grounded in the requirements of another statutory enactment, the NLRA." U.S. Br. 14.

[24] *See generally, e.g.*, *American Ship Bldg.*, 380 U.S. at 315 (recognizing "the legitimacy of [lockouts] as a means of applying economic pressure in support of bargaining positions"); *Buffalo Linen*, 353 U.S. at 93 (approving lockout "to preserve the multi-employer bargaining basis").

the labor market far more severely than the uniform salary term at issue here.

In short, employee consent to the challenged restraint — in contrast to employee consent to the collective bargaining *process* — is not required for application of the nonstatutory labor exemption.

C. There Is No Principled Basis For Terminating The Exemption In The Midst Of The Collective Bargaining Process.

Although the government agrees that the nonstatutory labor exemption does not require union consent to the challenged employment terms, it would nonetheless truncate the exemption some time soon after impasse, thereafter exposing to antitrust liability otherwise lawful bargaining conduct of a multiemployer unit. No statute, precedent, or logical principle supports this position, which rests on the incorrect premise, reflected in the dissenting opinion below, that at impasse "an agreement is no longer in sight or even being sought" and "hope [no longer] exists that an agreement may be reached." Pet. App. 60a, 54a.

This Court's decisions and those of the NLRB make clear that impasse is an *intermediate stage* of the collective bargaining process — not its end. Thus, in *Bonanno Linen*, the Court observed that impasse is "a recurring feature in the bargaining process, . . . only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" 454 U.S. at 412 (quoting NLRB decision).[25]

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[25] Numerous NLRB decisions, rejecting the premise of the dissent below, are in accord. *See, e.g., Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992) ("a genuine impasse is not the end of collective bargaining"; economic pressure, such as "unilateral changes in working conditions . . .

Nothing in the NLRA — or in the policies of the antitrust laws, for that matter — even suggests that antitrust challenges to joint actions of a multiemployer bargaining unit should be allowed to intrude in the *continuing* collective bargaining process at impasse. Indeed, "it is precisely at and during impasse . . . that the need for a stable, predictable bargaining unit becomes acute." *Bonanno Linen*, 454 U.S. at 413 & n.8 (citing NLRB brief). For that reason, labor law *requires* that after impasse, members of a multiemployer bargaining unit continue to bargain *as a unit* for a new permanent agreement; "impasse is not sufficiently destructive of group bargaining to justify unilateral withdrawal." *Id.* at 412. Accordingly, as Chief Judge Edwards observed below, the government's proposal does not "make[] the slightest sense under established labor law principles." Pet. App. 20a-21a; *see also* pp. 38-44, below.[26]

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usually breaks the stalemate"); *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973) ("impasse is not the end of collective bargaining"), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974). "[A]ssessing the significance of impasse and the dynamics of collective bargaining is the kind of judgment that *Buffalo Linen* ruled should be left to the Board." *Bonanno Linen*, 454 U.S. at 413.

[26] Petitioners urge (Pet. Br. 45-47) that the exemption should end even earlier — with the expiration of the collective bargaining agreement. Petitioners' counsel squarely rejected that position when he represented the government in *Powell*. As the government continues to recognize, petitioners' "position cannot be reconciled with the obligation of employers under federal labor law to maintain the terms of employment established by an expired collective bargaining agreement until impasse." U.S. Br. 16 (citing *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962)); *accord* U.S. Br. In Support of Cert., *Powell* (No. 89-1421), at 11-12.

D. There Is No Principled Basis For Selectively Excluding From The Exemption The Employers' Right Unilaterally To Implement Their Good Faith Bargaining Proposal At Impasse.

Petitioners acknowledge that members of a multiemployer unit may, without antitrust exposure, collectively "lock out their employees," "hire replacement workers," "contribute to a strike insurance fund," and "withdraw certain benefits contained in an expired bargaining agreement, [including] a minimum salary requirement." Pet. Br. 40. They nonetheless assert that the economic weapon at issue here — the employers' right unilaterally to implement terms proposed to the union and bargained in good faith to impasse — should be subject to antitrust liability. There is no principled basis for this assertion.[27]

This Court has recognized that the employer's right at impasse to "institute unilaterally the working conditions which he desires" is one of the lawful "tools of economic self-help" available to be used in the collective bargaining process. *American Ship Bldg. Co.*, 380 U.S. at 316; *accord Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991) ("employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse"), *cert. denied*, 504 U.S. 955 (1992).

The NLRB also has recognized for decades that the employers' right to implement at impasse is a legitimate

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[27] Petitioners recognize that outside professional sports, "post-impasse implementation of employment terms by employer associations has not elicited significant antitrust challenge to date and is unlikely to do so in the future." Pet. Br. 39. The reason, of course, is that there has never been any doubt that the economic weapons available to individual employers are also available to multiemployer bargaining units, which function as a single entity in the collective bargaining process. *See* p. 12, above.

"bargaining tactic." In *Bonanno Linen* itself, the Board held that at impasse, the employer may

> place into effect those wage increases or benefits it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In *these* and other possible *uses of impasse as a bargaining tactic*, the emphasis is toward achieving agreement . . .

Charles D. Bonanno Linen Serv., Inc., 243 N.L.R.B. 1093, 1094 (1979) (emphasis added); *see also Bonanno Linen*, 454 U.S. at 415-16 n.9 (describing NLRB's view of the "weapons at [the employer's] disposal for exerting economic pressure. It may engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, hire replacement workers . . . ."). More recently, in *Circuit-Wise, Inc.*, the Board again confirmed that under the labor-law scheme, the employers' unilateral implementation of terms and conditions of employment is no less a legitimate bargaining tactic than a lockout:

> Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate.

309 N.L.R.B. at 921 (quoting *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23). Thus, acceptance of the position advanced by petitioners would require this Court not only to depart from *American Ship Bldg.*, but also to "substitute [its] judgment for those of the Board with respect to the issues that Congress intended the Board should resolve." *Bonanno Linen*, 454

U.S. at 418 (addressing rights of employers at impasse). This the Court should not do. *Id.*

There is nothing in the case law, in federal labor policy, or in federal antitrust policy that would warrant treating this right differently from other authorized "tools of economic self-help," all of which were intended by Congress to be "unrestricted by *any* governmental power to regulate." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976) (quotation omitted) (emphasis in original); *id.* at 147 ("[r]esort to economic weapons . . . is the right of the employer" (quotation omitted)); *Golden State Transit*, 475 U.S. at 614 (laws that interfere with the bargaining process by "imposing additional restrictions on economic weapons of self-help" must give way). To the contrary, as organized labor has recognized,

> Neither the National Labor Relations Board, nor the state courts, nor the federal courts under the antitrust laws or otherwise may function as 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'

AFL-CIO Br. at 17 (quoting *Insurance Agents*, 361 U.S. at 489, 497); *see also id.* at 18 ("Whatever effects the antitrust laws may otherwise have on labor relations, those laws are in our view excluded absolutely from regulating coercive measures directed by businesses against unions . . . in bargaining over the terms of a collective bargaining agreement.").

Thus, there is no basis for Judge Wald's proposed distinction between (1) unilateral imposition of terms — which she characterized as "the end-product of an unsuccessful bargaining process" and "simply the way the employer decides to run his business in the absence of any bargaining agreement" — and (2) "bargaining tactics" like lockouts that "put

pressure on the other bargaining party to reach an agreement." Pet. App. 53a-54a (emphasis deleted). This purported "distinction" and its underlying premises have been squarely and repeatedly rejected by this Court and by the Board in the exercise of its "specialized judgment." *Buffalo Linen*, 353 U.S. at 96; *see* pp. 38-39, above.

First, as demonstrated at pages 36-37, above, impasse does *not* end the bargaining process. Second, there is no merit to the notion, also adopted by petitioners, that the right to implement unilaterally at impasse "is simply an exercise of the employers' residual, common law rights to operate their businesses." Pet. Br. 34. That notion is refuted by the continuing and extensive labor-law regulation of the implementation right at and after impasse. Unlike at common law, employers engaged in collective bargaining may not simply dictate terms of employment; they may implement *only* those terms that have been negotiated in good faith to impasse. *International Ass'n of Fire Fighters*, 304 N.L.R.B. 401, 402 (1991); *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989). Indeed, they may not even implement terms *more favorable to employees* than those that have been proposed to the union. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).[28] In any event, the employer's right to implement at impasse is a "right" safeguarded by the labor laws, not the common law. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111 (1989) (parties' *right* to make use of economic weapons, including those "not explicitly set forth in

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[28] There is also no basis for petitioners' assertion (Pet. Br. 36) that, despite a consistent line of NLRB precedents to the contrary, unilateral implementation of terms should be distinguished because it is "painful" only for employees. Unilateral implementation is no more painful for employees, and affords the employer no more benefits, than the hiring of replacement workers, which petitioners acknowledge (*id.* at 40) is within the scope of the exemption.

the Act," is a federal right protected from government interference).[29]

Furthermore, excluding from the exemption the employers' right to implement at impasse would run counter to federal labor policy, which seeks to sustain throughout the collective bargaining process a careful balance "unrestricted by any governmental power to regulate the substantive solution of [the parties'] differences." *Insurance Agents*, 361 U.S. at 488. The employers' right to implement at impasse is a counterweight to the additional economic weapon that, under the labor laws, the union secures at impasse: the right to make *interim* agreements with individual members of the

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[29] Petitioners (but not the government, which does not join the argument or even cite the cases) rely heavily on this Court's preemption cases, such as *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in an effort to show that the federal antitrust laws are part of a legal "backdrop" on which employees "are entitled to rely" after impasse. *See* Pet. Br. 29-30. None of those cases even remotely supports their position. In *Fort Halifax* and *Metropolitan Life*, the Court rejected direct preemption challenges to *state* regulatory regimes that provided *precisely defined* substantive entitlements to certain benefits; the Court held that such state regulation does not "undercut[] collective bargaining" because "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax*, 482 U.S. at 20 (citing *Metropolitan Life*). What petitioners propose here is fundamentally different: an active role for antitrust courts in collective bargaining, where federal judges and juries would determine, pursuant to the *imprecise* standards of the Sherman Act, what terms and conditions of employment are "reasonable." This would interfere with the collective bargaining process even more than the state law regime preempted in *Livadas*, which created disincentives for unions to seek collectively bargained arbitration clauses. 114 S. Ct. at 2078, 2082, 2085. None of these cases suggests, as petitioners contend, that at impasse employees are entitled to invoke antitrust courts as a vehicle to increase their leverage in collective bargaining.

multi-employer bargaining unit, and thereby to "whipsaw" management. *See Bonanno Linen*, 454 U.S. at 415-16 & n.9. The economic force of this added right is significant. Indeed, the dissenters in *Bonanno Linen* argued:

> By allowing the union to negotiate interim agreements in order to whipsaw the employer group and yet denying the employers the necessary defense of withdrawal [from the multiemployer collective bargaining unit], the Board is hardly living up to its asserted — and mandated — commitment to evenhandedness.

Id. at 423 (Burger, C.J., and Rehnquist, J., dissenting). Thus, the right to implement proposals at impasse is necessary to *maintain* the pre-existing balance of economic weapons authorized by the labor laws; subjecting that right to antitrust liability would fundamentally alter that balance.

Petitioners imply that in the absence of an antitrust remedy, unionized employees would have no recourse if employers, exercising their right to implement, were to impose harsh or unduly restrictive terms. That suggestion entirely overlooks (1) the array of economic weapons available to the union at impasse, including the right to strike and the right to whipsaw members of the bargaining unit, (2) the labor law limits on the employers' exercise of their right and the availability of labor law remedies to enforce those limits,[30] (3) the continuing obligation of employers to engage in good faith bargaining once negotiations resume, and (4) the temporary nature of the implemented terms, which last only until a new collective bargaining agreement is reached, *see* p. 5 n.3, above. In short, petitioners — who six years ago "invoke[d]

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[30] *See, e.g., Silverman ex rel. NLRB v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995) (sustaining injunction barring unilateral implementation of terms for baseball players because employers had not bargained in good faith to impasse).

the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members [did] not care deeply enough to strike" (Pet. App. 20a) — have once again simply ignored the collective bargaining process.

E. The Position Advanced By Petitioners And The Government Would Make Multiemployer Bargaining Unworkable.

Multiemployer bargaining, by definition, requires joint action by employers. Both petitioners (Pet. Br. 40) and the government (U.S. Br. 18 n.5) concede that some joint bargaining conduct by employers must be immune from antitrust attack if multiemployer bargaining is to operate at all. But petitioners and the government fail to recognize that their arguments, if accepted, would make multiemployer bargaining unworkable.

Labor law gives employers a limited set of options at impasse: they may maintain the status quo, implement the terms of their last offer, or lock out their employees. A member of a multiemployer unit has an additional option: it may enter into a separate, interim agreement with the union, but it may not withdraw from the multiemployer unit, and it must resume joint bargaining once the impasse is broken.

The government would effectively rule out every one of the employers' options except separate interim agreements with the union. The government contends (U.S. Br. at 18 n.5) that *any* joint action following impasse, apart from a renewal of joint bargaining, is subject to antitrust scrutiny and indeed may well constitute a *per se* antitrust violation. Under this view, after impasse employers would simultaneously be obligated (1) by the labor laws to discuss *collectively* proposed *future* terms of employment and (2) by the antitrust laws to act *independently* with regard to *current* terms of employment. Such obligations would place employers in an untenable

position — required to continue joint discussions, yet facing potential allegations, from employees eager to seek a bargaining advantage, that each joint meeting is evidence of a *per se* antitrust violation. That prospect — and the treble damage risk that it entails — would discourage multiemployer bargaining in the first instance, and thereby undermine "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95.[31]

Petitioners, unlike the government, concede that joint lockouts must be immunized if multiemployer bargaining is to work. Pet. Br. 40 (citing Pet. App. 53a-54a n.7 (Wald, J., dissenting)). But petitioners' position is also incompatible with the collective bargaining process established by Congress. By depriving members of multiemployer units of the "intermediate options" afforded by labor law (implementing proposed terms, continuing to maintain the status quo), petitioners would force employers to make a drastic choice between a lockout and capitulation to the union's demands. Such a dramatic alteration of the collective bargaining process would harm both employees and employers, and would be utterly inconsistent with national labor policy.

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[31] Furthermore, truncating the exemption soon after impasse would encourage labor not to reach agreement, but instead to force or feign impasse to gain not only the coercive advantage of a treble damage antitrust threat, but also the opportunity to seek new terms and conditions of employment through antitrust injunctive relief. The government itself acknowledges that "those concerns are not without some substance." U.S. Br. 24. Indeed, that is precisely what happened in *Powell* after the district court erroneously ruled that the exemption expires at impasse; on the first business day following that ruling, and notwithstanding the court's suggestion that the parties were not then at impasse, the NFLPA advised the NFL, *for the first time*, that the parties had reached impasse. *See Powell*, 930 F.2d at 1296; *see also Powell*, 678 F. Supp. at 789 n.22 (noting that parties "are not so far apart in negotiations as this lawsuit would suggest").

These concerns are particularly compelling in the context of professional sports leagues. Although multiemployer bargaining is generally a voluntary matter for both employers and employees, that is not the case for the interdependent members of a sports league; in order even to produce their joint product, they must cooperate in many respects, including in determining numerous common terms and conditions of employment that are mandatory subjects of bargaining. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383, 1389 (5th Cir.) (affirming NLRB determination that teams in a soccer league must bargain as a "joint employer"), *cert. denied*, 449 U.S. 899 (1980). *See generally NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is sports leagues." (quoting Robert Bork, *The Antitrust Paradox* 278 (1978))); *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("consistency of staffing, rules, [and] training . . . are at least arguably necessary to permit the league to create an appealing product in the entertainment market"). As petitioners' amici, the NBA Players Association, informed the Second Circuit: in professional sports, "regardless of the outcome of litigation [over terms and conditions of employment], some collective bargain will eventually be reached." NBPA Br., *Williams*, at 27.

Thus, two courts of appeals and the NLRB have recognized that "sports leagues are an exception to the principle of voluntariness" in multiemployer bargaining.

> In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . . Unlike the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition are

> just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.

Williams, 45 F.3d at 689; *accord North Am. Soccer League*, 613 F.2d at 1381-83. Indeed, the NLRB has twice expressly held that the member clubs of the NFL "constitute a single employer for bargaining purposes." *NFL Management Council*, 203 N.L.R.B. 958, 961 (1973), *remanded on other grounds*, *National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974); *NFL Management Council*, 309 N.L.R.B. 78, 92 (1992).

Because of the need for many common terms and conditions of employment, the positions advanced by petitioners and the government, if adopted by the Court, would inevitably cause chaos, if not a complete shutdown of league operations, upon the expiration of every collective bargaining agreement. For example, an interim agreement at impasse between the union and one NFL club — increasing that club's roster size, or reducing the number of regular season games for its players, or committing that club to treat as free agents rookies drafted by other clubs — would cripple the League's ability jointly to produce its common product, which by its very nature requires that numerous terms and conditions of employment be common to all clubs.

To the extent that restraints in a labor market adversely affect competition interests, those interests are most compelling when a market is restrained by the *voluntary* and *unauthorized* joining together of *independent* competitors. None of those circumstances is present in professional sports. Therefore, whatever accommodation of the antitrust and labor laws may be appropriate in industries in which independent competitors voluntarily join together for collective bargaining purposes, there can be no question about the appropriate result here: Members of a compulsory multiemployer unit like a

professional sports league, which are expected to function as a single entity for collective bargaining purposes, cannot be subject to antitrust scrutiny for engaging jointly in conduct that would otherwise be lawful for a single employer and that must be available for the collective bargaining process to work as intended by Congress.[32]

CONCLUSION

Petitioners and their union claim that they are entitled to the benefits of *both* the labor laws (the right to combine for bargaining leverage, the right to strike, the right to compel good faith negotiation by their employers) and the antitrust laws (the right to secure treble damages and injunctive relief from federal courts) for use in determining, through *collective bargaining*, the terms and conditions of their employment. That position is fundamentally wrong because the cornerstone of federal labor policy is the complete *exclusion* of government, including antitrust courts, from the collective bargaining process.

Petitioners and their union also claim that, in addition to exercising antitrust "rights" as a weapon in the collective

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[32] The "often tempestuous" relationship between professional sports leagues and their employees cannot be attributed to the recent labor antitrust cases, as petitioners assert; those tensions can be traced to the origins of professional sports. *Powell*, 930 F.2d at 1303. Indeed, the recent decisions of the D.C. and Second Circuits have plainly contributed to stabilizing labor relations in professional sports. After the decision below, the NFL and the NFLPA agreed to extend their collective bargaining agreement into the next century; after *Williams*, the NBA and the NHL reached agreements with their unions that will ensure labor peace for many years to come. Petitioners' proposal, in contrast, would ensure, upon the expiration of each league's collective bargaining agreement, resumption of the chaotic cycle of union-sponsored antitrust litigation, resolved by a collective bargaining agreement, and more union-sponsored antitrust litigation, that is fundamentally at odds with national labor policy.

bargaining process, they are entitled also to receive the benefits of *multiemployer* bargaining (*e.g.*, pensions, injury protection, and the extraordinary earning opportunities made possible by the *necessarily* common terms and conditions of employment in the NFL). That position is fundamentally wrong because their proposed use of the antitrust laws assumes that the employers are *independent competitors* that may not engage in coordinated conduct, while multiemployer bargaining assumes that the employers will function as a *single entity* in collective bargaining.

Petitioners' position is demonstrably inconsistent with both the labor-law and the antitrust regimes and, if sustained, would create chaos in multiemployer bargaining throughout the United States.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

1. Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

   The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

2. Section 20 of the Clayton Act, 29 U.S.C. § 52, provides, in part:

   No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

3. Section 2 of the National Labor Relations Act, 29 U.S.C. § 152, provides, in part:

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

4. Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides, in part:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

5. Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in part:

> (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

6. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides, in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this act [29 U.S.C. § 103];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

* * * * *

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; . . . .